

Looking for the 'Justice' in EU civil and private law?

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It is great to see this debate on the EU justice deficit. To me this debate goes to the fundamental issue of legitimacy, with which the EU continues to grapple. However I have one regret, which relates to the lack of attention devoted to the European Union's justice deficit in the area of civil and private law. All of us enter into private law obligations throughout our lives, making small contracts, buying property, inheriting property, being involved in an accident; the list is endless. The justice or injustice consequences of these civil law interactions, in terms of the way in which these obligations operate, are construed and adjudicated upon which can dramatically impact individuals and society.

For me this was a recurring worry as an MEP for 12 years (1999-2012). Throughout this time I was an active member of the European Parliament's Legal Affairs Committee, originally the Legal Affairs and Internal Market Committee. It was this policy committee's role to deal with most of the civil and commercial law policy and legislation. I had this nagging doubt that somehow we did not spend enough time talking about the overall justice implications of what we were doing. This in the most basic sense, of examining the fairness of various political options in terms of the outcomes caused by constructing the law in a particular way. The guiding mantra always seemed to be the Internal Market with justice issues hiding in the back ground and presented mainly under the heading 'access to justice' rather than the content of the law itself.

Often I tried to explain to parliamentary colleagues from other committees the crucial nature of what I thought we were doing, or maybe could do. I watched as their eyes glazed over, my own enthusiasm was not enough to convince. The Legal Affairs Committee tended to be a quiet, perhaps unexciting rather technical committee in the way it was perceived. This was in stark contrast to the work and visibility of the Civil Liberties Committee, which would so often be in the headlines. Dealing with matters of personal liberties and human rights; Illegal rendition, PNR and Swift to name but a few issues, all of which would evoke perhaps feelings of outrage, intense debate and media coverage. Yet the reality is that thankfully more EU citizens are likely to be affected by the ramifications of civil and private law than by a terrorist or criminal act. So why the mismatch in terms of active political debate and attention to justice? Behind the technical debates in the Legal Affairs Committee on such pieces of lawyer's law like the Brussels 1 Regulation or the Rome 11 Regulation big political choices were being made with impact on the rights of individuals.

Occasionally and in increasingly rare instances some issues managed to surface, this occurred where there were strong vocal classes or interest groups. For example during the passage of Brussels 1 when it first became a European Regulation replacing the previous Convention. In this instance consumer rights organisations

were pitted against the business and e-commerce lobbies, the latter believing that consumers should have to chase businesses in foreign courts to get redress. Indeed it became so dramatic at one stage that I literally had to vote down my own report as rapporteur in committee so as to start again and ultimately secure the consumer friendly conflict rule of European private international law.

This type of excitement about private international law is rare. Of course we stood on the verge of a potentially intriguing development concerning the choice of law in Rome 11. A rule on the law applicable to defamation, but it became such a hot potato with the 'press' lobby, that the Commission withdrew the offending section from the proposal. The many ordinary people who maybe the victims of defamation on the internet had no lobby to fight their corner or at least not one as powerful as that mustered by the press, who indicated that defamation victims were all high worth individuals who could well afford lawyers to deal with the vagaries of foreign courts and foreign law which would otherwise have a chilling effect on the freedom press. It was impossible against this background to have a sensible discussion about what might be the justice and fairness needs of society as a whole.

By contrast within the debates around Brussels 1 and Rome 11 there was a strong attachment to the victims of road traffic accidents and their needs and rights. However this was perhaps due firstly to the fact that motor insurance claims had previously been the subject of several sectoral Directives and had thus singled out for special treatment by the European legislature, also there was a effective intervention from th a pan European lawyers group dealing with personal injuries issues. The end result being fundamental changes in the way these victims could both access their national courts (as opposed to the court where the accident happened) and to some extent have consideration given to their own national law in calculating damages.

This meager selection of issues from the private law field, were the exceptions rather than the rule in terms of consideration of the justice or fairness of the law being made. In contrast the more major debates would circle around whether or not there was a legal base to allow legislation, so a quasi constitutional inter-institutional arm wrestle rather than getting on and looking at what the relevant law might do for people. The long and sorry saga of European Contract Law is just such a case in point, another, the failure to deliver a system of European collective redress.

It is a though we are scared to talk about a system or vision for European civil justice or private law. Such talk treads on the toes of Member State governments and the sense that justice and its delivery remains securely their territory. However surely if we want to deliver not only access to justice, but fairness across the Internal Market the system on offer has to be accessible in terms of being understood as well as available. Users need to agree openly through the legislative process the rights we are giving them or depriving them of, and for that the political debate on European civil law needs to be more open and robust; and yes, more democratic. So we go round in a circle, the justice deficit is indeed closely linked to the democratic deficit. One of my legal heros, Jeremy Betham would have undertood this linkage and might indeed repay re-visiting.

